

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KORI LANE LAKE,

Plaintiff,

v.

GRAYS HARBOR COUNTY SHERIFF
MICHAEL J. WHELAN,

Defendant.

Case No. C10-5317BHS/JRC

REPORT AND RECOMMENDATION

NOTED: DECEMBER 10, 2010

This Title 42 U.S.C. § 1983 civil rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrate Judges' Rules MJR 1, MJR 3, and MJR 4.

Before the court is defendant's motion for summary judgment (ECF No. 28). Plaintiff has responded and defendant has replied (ECF Nos. 29 and 30). The plaintiff's second response and defendant's surreply are not authorized by the Local Rules and have not been considered (ECF Nos. 32 and 33).

1 The undersigned recommends that the motion for summary judgment be granted and that
2 this action be dismissed with prejudice.

3 The uncontradicted evidence shows that plaintiff's Fourteenth Amendment liberty
4 interests were not violated when defendant released information regarding the plaintiff to the
5 public warning that plaintiff was dangerous and a "mentally ill offender" because the state's
6 interest in protecting the public from violent offenders outweighs plaintiff's claimed liberty
7 interest. Further, the defendant is entitled to qualified immunity because it was not clearly
8 established that he was prohibited from making such a public disclosure.
9

10 FACTS

11 Plaintiff was convicted of aggravated assault and felony theft in 1990 in Montana
12 (Motion for summary judgment, ECF No. 28, page 2). The Grays Harbor Sheriff had received
13 information about the crime committed in Montana from authorities in that state. Specifically,
14 they were told that plaintiff slit the throat of a person who picked him up while he was
15 hitchhiking. Plaintiff then stole the car (Motion for summary judgment, ECF 28, page 2). In the
16 late 1990's, plaintiff was convicted in Washington state of robbery in the first degree while
17 armed with a deadly weapon (Motion for summary judgment, ECF No. 28, page 2). The
18 information Grays Harbor had about the Washington conviction is that plaintiff intended to kill
19 his victim even though the victim was tied and could not stop the robbery from occurring
20 (Motion for summary judgment, ECF No. 28, page 2).
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23 When Mr. Lake finished serving his Montana sentence in 2008, he was returned to
24 Washington State by Montana Prison officials to begin serving probation on his Washington
25 conviction. Rather than releasing Mr. Lakes and having him report to Washington, the Montana
26 Department of Corrections physically transported him because they believed him to be mentally

1 ill and dangerous. Plaintiff acknowledges he became “completely psychotic” while in the
2 Montana prison system (Complaint, ECF No. 1, page 4).

3 Officials in Grays Harbor prepared a public notification to warn the people of the area
4 that a person they believed to be mentally ill and dangerous was about to be released. The
5 bulletin identified Mr. Lake and gave very brief descriptions of his crimes (Complaint ECF No.1
6 Exhibit 1). The bulletin also warned:

7
8 Montana DOC **considers Lake to be a dangerous, mentally ill offender and an**
9 **extreme risk to the public** and law enforcement with ties to white supremacist
10 groups in Idaho [sic]. Washington Department of Corrections, the Grays Harbor
11 County Sheriff’s Department and the Aberdeen Police department will be
12 coordinating to have Lake mentally evaluated prior to being released. If the
13 mental health evaluation determines he is fit for release, he will be released in
14 Aberdeen. Lake will be required to report to the DOC office in Aberdeen at 9:00
15 a.m. on Monday May 5. **If you should have any contact with this individual,**
16 **use extreme caution.**

17 (Complain ECF No. 1 Exhibit 1(Emphasis in original)).

18 Mr. Lake was scheduled to be released May 3, 2008, but during the mental health
19 evaluation process Mr. Lake threatened to slit the throat of his probation officer and the
20 probation officer’s son. Mr. Lake was arrested on new charges and convicted of felony
21 harassment. The public notification bulletin was released May 2, 2008, and it was removed from
22 the Grays Harbor Sheriff’s web page shortly after it was posted. Because it had been released, it
23 remains on different servers on the World Wide Web and can still be found.

24 Plaintiff filed this action alleging the release of the bulletin violated his Fourteenth
25 Amendment liberty interest because the Sheriff released information that he was mentally ill.
26 Plaintiff alleges that he found the bulletin on a web site on April 15, 2010 (Complaint, ECF No.
1, page 4 ¶ 3). In another part of the complaint he says he found the information May, 15, 2010
(Complaint, ECF No. 1, page 5 ¶ 15). He does not claim that this web is in any way connected

1 to the Grays Harbor Sheriff's Office. Plaintiff seeks an injunction demanding that the Grays
2 Harbor Sheriff's Office "cease and desist" from publicizing his mental health status and the
3 Department of Corrections stop releasing information about his mental health. He also asks for
4 twenty-four thousand dollars (\$24,000) in damages (Complaint ECF No. 1).

5 Defendant moves for summary judgment and argues there was no constitutional violation
6 because there is no liberty interest at stake and while there is a possible Fourth Amendment
7 claim, the right to privacy is not absolute and may be curtailed by a proper government interest
8 such as protection of the public (Motion for summary judgment, ECF No. 28, page 5).

9 Defendant also raises the affirmative defense of qualified immunity (Motion for summary
10 judgment, ECF No. 28, page 7).

11 12 13 STANDARD OF REVIEW

14 In federal court, summary judgment is required under Fed. R. Civ. P. 56(c) if the
15 evidence, viewed in the light most favorable to the nonmoving party, shows that there is no
16 genuine issue as to any material fact. Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th
17 Cir.1997). The moving party bears the initial burden of establishing the absence of a genuine
18 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). That burden may
19 be met by "'showing' -- that is, pointing out to the district court -- that there is an absence of
20 evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met its
21 initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify
22 facts that show a genuine issue for trial. Id. at 323-24; Anderson v. Liberty Lobby, Inc., 477
23 U.S. 242, 248 (1986).

DISCUSSION

The Ninth Circuit has held that the release of a public notification does not violate any constitutional right or duty owed to an inmate because of the government interest in protecting the public. Russell v. Gregoire, 124 F. 3d 1079, 1092 (9th Cir. 1997) (*citing* Paul v. Davis, 424 U.S. 693, 701 (1976)). In Paul v. Davis, *supra*, the Supreme Court found no liberty interest was at stake.

These cases do not specifically address release of mental health information. The information concerning plaintiff's mental state formed the basis for law enforcement's fear that plaintiff posed an extreme threat to the public. The release of this information, in substance, was no different than the information at issue in the above cases. The fact that plaintiff was dangerous because of his mental illness, does not in any way detract from the fact that he was dangerous. Therefore, the notice was not in appropriate.

To the extent that this case may raise a Fourth Amendment claim because it involves the release of mental health information, the defendant would still be entitled to qualified immunity from suit. State officials are entitled to qualified immunity unless they violated clearly established law of which a reasonable person should have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In evaluating the issue of qualified immunity, the court follows a two-part test: (1) whether the facts alleged "show [that] the officer[s]' conduct violated a constitutional right"; and (2) whether the constitutional right in question was "clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz 533 U.S. 194, 201-02 (2001); *see also* Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050 (9th Cir. 2002).

1 For a law to be “clearly established,” it must be sufficiently clear that a reasonable
2 official would understand that his or her action violates that right. Anderson v. Creighton, 483
3 U.S. 635, 640 (1987). The court should look to whatever decisional law is available to determine
4 whether the law was clearly established at the time the alleged acts occurred. Capoeman v.
5 Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

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7 Defendant Whelan could reasonably have believed that the public notification of
8 plaintiff’s dangerous mental illness was constitutional. It is undisputed that plaintiff’s mental
9 illness made plaintiff a danger to the public. Plaintiff admits that, he became “completely
10 psychotic” while he was in the Montana prison system (Complaint, ECF No. 1, page 4 ¶ 6).
11 Further, he infers he was psychotic when he was scheduled to be released on May 3, 2008
12 (Complaint, ECF No. 1, page 5 ¶ 8 through 11). Therefore, since there is no binding authority
13 that precludes notice to the public of the danger posed by a person with mental illness, it could
14 hardly be argued that such a claimed prohibition is “clearly established.” Therefore, even if the
15 court were to say that defendant should not have disclosed plaintiff’s mental illness, defendant is
16 still entitled to qualified immunity because an official in defendant’s position would not have
17 reasonably assumed that such disclosure was a violation of plaintiff’s constitutional rights.

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19 Finally, since there is no evidence that defendant continues to post this bulletin, and the
20 posting is not otherwise unconstitutional, plaintiff is not entitled to an injunction.

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22 The court recommends that the motion for summary judgment be granted and that this
23 action be DISMISSED WITH PREJUDICE.

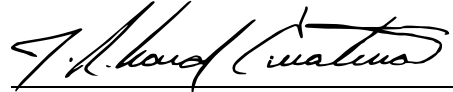
24 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
25 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
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1 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.

2 Thomas v. Arn, 474 U.S. 140 (1985).

3 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
4 matter for consideration on December 10, 2010, as noted in the caption.

5 Dated this 12th day of November, 2010.

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8 J. Richard Creatura
9 United States Magistrate Judge
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